Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DENNIS BREEN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Whether Procedural Rules Depriving Defendants of Suppression Hearings Before Trial Are Unconstitutional.

2. Whether There Is A Violation of Due Process When Reasonable Defenses Claimed By Defendants Are Not Presented To The Jury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dennis Breen, respectfully prays that this Writ Of Certiorari issue.

OPINIONS BELOW

The unreported opinion of the New Jersey Appellate Division affirming the trial court is in the Petition Appendix (Pet. App.) at App. 2a-11a. The unreported decision and order for replevin in favor of petitioner is at App. 12a-18a.

STATEMENT OF JURISDICTION

The Order denying discretionary review of the judgment below by the New Jersey Supreme Court, the highest applicable state court, was entered March 26, 2002 and the denial of the motion for reconsideration was entered on May 13, 2002. This Court has jurisdiction to review the judgment under U.S.C.A. 1257(3) where a state procedure " in question on the ground of its being repugnant to the Constitution..."

CONSTITUTIONAL AMENDMENTS INVOLVED

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment :

> "No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law..."

The Fourteenth Amendment:

> Section 1.....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;nor shall any State deprive any person of life, liberty or property, without due process of law;nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted of possession of a Ruger and a Norinco which are banned in New Jersey as assault weapons pursuant to N.J.S. 2C:39-5f and also an illegal capacity ammunition magazine pursuant to N.J.S 2C:39-3j. Expecting immunity from prosecution pursuant to N.J.S. 2C:39-12, petitioner had voluntarily turned over this property in question to the police by providing keys to locked containers. Pursuant to 2C:39-12, New Jersey citizens are protected from self-incrimination and the State must grant immunity from prosecution for possession of certain illegal items, such weapons and magazines, if all the conditions of this statute are met. Pet. App.8a. Petitioner met all the conditions. This statute was enacted to entice citizens to surrender any weapons deemed illegal without fear of prosecution.

For safekeeping purposes, Dennis Breen, petitioner, temporarily stored his property in securely locked cabinets in a locked bedroom closet in the home of his brother. On June 28, 1998, Duncan Breen, petitioner's brother, ("brother") was arrested for domestic violence and placed in a cruiser to be transported to the police station. Petitioner did not live with his brother and was not present at the domestic violence scene.

Without a warrant, with the brother in the cruiser and no danger to the victim, police nevertheless searched the brother's home and came across the locked bedroom where petitioner's property was stored. The police learned from the brother (who was in the cruiser) that petitioner had the key to the locked

door. The police did not take the defendant immediately to the police station to obtain a warrant to search for and seize weapons. It is undisputed that the police proceeded with the warrantless forcible entry of the locked bedroom door and the seizure of petitioner's locked property in the closet. There were no exigent circumstances to search for and seize weapons and there were not firearms in plain view. The locked cabinets were taken to the police station.

At the police station, the victim filed a New Jersey Domestic Violence Civil Complaint against petitioner's brother. At the same time, after the warrantless seizure of petitioner's property, the police obtained pursuant to N.J.S. 2C:25-21, a Temporary Restraining Order ("TRO") in combination with a specific Warrant to Search for and Seize Weapons for Safekeeping in a domestic violence situation. This special warrant was issued against the brother, Duncan Breen, not petitioner, Dennis Breen. A call to a municipal court judge was all that was necessary to issue the TRO. This specific warrant was for safekeeping of weapons and inventory. The weapons would then be returned to the owner if there were no conviction on the domestic violence and other conditions were met as set forth below. Pet. App. 16a.

After petitioner learned his locked cabinets were at the police station, he made plans to pick up his property and at the same time turn over any weapons in the locked cases that may be in violation of the ban-on-assault-weapons statute.

Thus, on July 1, 1998, relying on the State's protection from self-incrimination and prosecution pursuant to 2C:39-12, petitioner satisfied all the conditions of the statute by first advising the Police Chief in writing of his intent to voluntarily surrender certain firearms and devices. To obtain immunity, as required by the statute, petitioner must not have been under investigation or charged with unlawful possession of weapons or magazines when he surrendered the items in question. These weapons and magazines in the securely locked containers were

removed from home of petitioner's brother and taken to the police station merely for safekeeping and inventory purposes.

On July 2, 1998, again relying on the State's assurances in 2C:39-12, petitioner went to the police station and voluntarily turned over questionable weapons and devices by providing the keys for the police to open his securely locked property.

The police had not attempted to break open the locked cabinets. They remained locked until petitioner provided the keys. Pet. App. 3a. A policeman testified at the trial that the police were not sure what was in the locked containers, but assumed they contained guns. According to the police, the incredible reason for not forcing open the locked cabinets was a fear of "booby traps."

Thus, petitioner, owner of the firearms, was neither at the scene of the domestic violence nor was he charged or investigated for any other offense. However, the State would not return the petitioner's remaining property, namely, his legal guns and ammunition. The reason given for holding the property was to determine which weapons qualify as assault weapons. Pet. App. 16a.

After numerous attempts to secure the return of his property from the prosecutor, petitioner filed a Complaint for Replevin on January 6, 1999. After a hearing, on March 15, 1999, the court ordered the return of petitioner's property. The civil trial judge allowed six-months for petitioner to modify the assault weapons and, thus, reclaim them. The civil trial judge ruled that petitioner did surrender his weapons and had not been charged with any offense for possessing assault weapons. Pet. App. 13a.

In his ruling the civil trial judge reiterated that under 2C:25-21(d)(3) weapons are to be returned to the owner if the domestic violence is dismissed, there is no probable cause to indict for domestic violence, if the owner is found not guilty of the charges or "if the court determines that the domestic violence situation no longer exists". The court ruled that since

petitioner was not involved in the domestic violence incident, he was entitled to the return of his seized weapons. Pet. App. 16a. [1]

On March 15, 1999, the same day as the Order to return petitioner's property was filed and after almost nine months since the domestic violence incident, the prosecutor decided to prosecute petitioner for possession of illegal assault weapons and magazines.

At the grand jury on March 24, 1999, a policeman adopted the false representation concerning the warrant:

Prosecutor: " And they[locked containers] were secured ... and taken to headquarters that was after a search warrant had been approved by the Judge. Is that correct?"

Policeman: "Correct".

It is undisputed that the prosecutor's statement is false.

The grand jurors expressed confusion as to the testimony about locked cabinets and wanted to know, *inter alia*, if the cases were glass and if "you can see inside."

The prosecutor did not advise the grand jury of the exculpatory 2C:39-12 statute of voluntary surrender, the defense to possession of illegal weapons and magazine or of the domestic violence statute. Yet, the grand jury was advised of other possible defenses not relevant to petitioner, such as, the use of illegal assault weapons in sanctioned shooting matches.

It is undisputed that the police learned that the locked boxes belonged to petitioner. The State did not return the locked boxes to the rightful third-party owner, petitioner, pursuant to N.J.S. 2C:25-21d(3). Pet. App. 16a. Moreover, the judge in the criminal trial acknowledged that the warrant at issue in conjunction with the TRO "is not a search warrant" in

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[1] In a footnote in his decision, the civil trial judge for replevin indicated that if the prosecutor had reason to prosecute for illegal possession of weapons, then the modified assault weapons would not be returned. Pet. App. 16.

the true sense. Yet, this judge found that the police "had the absolute right to break into these boxes" despite the fact they had no warrant to do so. No valid search warrant was issued as to petitioner. The police admitted that the Warrant to Search for and Seize Weapons was obtained after the closet door had been forced open and the locked cases had been taken to the police station.

The trial judge, *inter alia*, denied the suppression hearing as being "grossly out of time... and if heard, because of the lack of merit" despite petitioner's not knowing of the warrantless search until trial time. Pet. App.20a. Moreover, it was not clear to petitioner until later that the police knew the petitioner was the owner of the locked property when it was removed. It is undisputed that police had not obtained any warrant to search the locked property of petitioner once it was taken to the police station. The trial judge refused to charge petitioner's defenses to the jury namely, the exculpatory voluntary surrender statute, 2C:39-12 and domestic violence statute, 2C:25-21d. Petitioner was convicted of possession illegal weapons and one illegal magazine.

In its decision, the appellate division did not mention the fact that there was a warrantless search and seizure. The panel accepted the call to the municipal court judge as a basis for a proper warrant to open the locked property of petitioner when such authorization was listed for the brother's property. Pet. App. 3a. The police had reason to believe the locked containers belonged to petitioner because the brother told them petitioner had the key.

The appellate panel concluded incorrectly that an investigation had begun against petitioner when the locked containers were seized and, thus, immunity did not apply. Pet. App. 9a;13a. The panel ruled that "although defendant retained ownership of the firearms, he no longer had possession after the seizure." The appellate panel held that "[o]nce the gun cabinet and cases were seized, defendant no longer exerted control over

them. Thus, he did not possess them. As a result he had nothing to surrender. Pet.App. 8a-9a.

The appellate panel did not address the denial of the suppression hearing which was brought up on appeal. Moreover, the appellate panel constructively transferred to the petitioner the issuance of the restrictive Warrant to Search and Seize Weapons For Safekeeping which was issued against his brother in a domestic violence incident. The panel summarily dismissed the issue of the defective charge to the jury which did not set forth petitioner's defenses.

On October 5, 2001, the Appellate Division affirmed the conviction. The New Jersey Supreme Court denied certification on March 25, 2002. The motion for reconsideration was denied by the New Jersey Supreme Court on May 13, 2002. This petition for a writ of certiorari followed.

REASONS FOR GRANTING CERTIFICATION

This petition should be granted because this case involves recurring issues that impact the fundamental rights of our citizens by the inconsistent and arbitrary rulings and misinterpretation of the Fourth, Fifth, and Fourteenth Amendments by the courts.

I. Certiorari Is Warranted Because "Excluding ...The Use Of Evidence Secured Through An Illegal Search And Seizure, Is Not A Mere Rule Of Evidence But Is Required By the Fourth Amendment." There Is No Uniformity in Both State and Federal Courts As To Timeliness And Reasons For Granting or Denying Suppression Hearings To Exclude Evidence Obtained From Illegal Searches.

The appellate division did not even address the important issue presented concerning the denial of the "untimely" suppression hearing based on the warrantless search. The trial judge below had ruled it was "grossly out of time and also, if heard, [without hearing it] because of the lack of merit." Pet. App. 20a.

In *Kuhl v. United States* , 370 F.2d 20, (CA9 1966), the dissent in the Ninth Circuit (citing *Mapp v. Ohio*, 367 U.S. 643 (1961), reminded the court that the Supreme Court made it clear that " excluding ...the use of evidence secured through an illegal search and seizure, is not a mere rule of evidence but is required by the Fourth Amendment. The Court further held that, through the operation of the Due Process Clause of the Fourteenth Amendment, this same exclusionary rule is also enforceable in state prosecutions." In *Kuhl*, the defendant sought to file his motions after his conviction by a jury and was denied on appeal.

In *United States v. Thoresen*, 428 F.2d 654 (1970), the Ninth Circuit found that Mrs. Thoresen was entitled to a suppression hearing after her conviction on a reindictment. Defendant had not had a suppression hearing after her first indictment because her charges had been dismissed.

In *People v. Covelli* (1989) , 184 Ill. App. 3d 114, the Illinois Court found on appeal that the defendant's motion to dismiss was not untimely as ruled by the trial court because defendant was under the impression that "discovery was to be completed before pretrial motions were to be filed."

In *Collier v. The State*, 319 171 Ga. App. 214 (1984), the Georgia Appeals Court, allowed a defendant after his conviction to file his motion to suppress evidence. Defendant's motion to suppress had been filed prior to the calling of the docket on the morning of the trial and it was dismissed "as both untimely and dilatory." The Appeals Court noted that the state code did not specify a period of time within a motion to suppress must be filed. Thus, the court ruled that a motion to suppress can be filed anytime before trial. In *Collier*, the conviction would be reinstated if it is determined after the suppression hearing the evidence was lawfully seized.

In *Stanley v. The State*, 242 Ga. App. 597 (2000), the Appeals Court upheld a motion to dismiss a motion to suppress presented on the second day of a trial with the judge sitting as

factfinder. The Georgia Appeals Court in *Thompson v. State*, 195 Ga. App 18, 20-21 (1990), held a motion to suppress as untimely when filed on the first day of trial and in *Montgomery v. State*, 204 Ga.App. 534, 536(1992), this appeals court found a motion to suppress untimely when made after the state's case.

In *United States v. Leslie Schmidt*, 604F.2d 236 (CA3 1979), agreeing with *Thoresen*, the Third Circuit reversed the district court's denial of a suppression hearing prior to trial after which defendant pled guilty. The court below denied the suppression hearing because defendant's co-conspirators had challenged the same search at a hearing to which defendant was not a party.

In *Ohio v. Fitzgerald*, 2002-Ohio-3914 (Ohio App. Dist.2 2002). The Ohio Court of Appeals upheld the denial of a suppression hearing as untimely having been filed one month before trial. The defendant went way past the 35day-rule after his arraignment on April 30, 2001 to file a motion to suppress. Defendant' new defense counsel filed the motion to suppress for the first time on August 10, 2001, a day after his appearance as counsel and a month before the trial date.

In *Vega v. State of Arkansas*, 1988.Ar.5134, the Court of Appeals of Arkansas held that "[w]hile the trial court might have raised the issue on its own of the timeliness of appellant's motion to suppress, [Ark. Rule of Crim.Pr.] does not mandate the denial of every motion that is untimely." The court held although the motion to suppress was filed only six days before trial [rather than ten days pursuant to the rule] and therefore untimely, once the hearing was held without objection, the ruling was properly preserved for review.

But, in contrast, in *People v. Tyler*, 874 P.2d 1037 (Colo. 1994), the Colorado Supreme Court overturned the appeals court and ruled that despite the fact that the court conducted a suppression hearing, the issue of timeliness is not moot and could be a proper ground for denial.

In the *People v. Gonzales*, 233 Cal. App. 3d 1425 (Cal.App.Dist.5 1991), the Appeals Court reiterated the CA Penal Code's mandate that a criminal defendant has a right to a suppression hearing if the defense gives notice of 10-days before trial to the prosecution and not a matter of judicial discretion. Defendant's motion for a suppression hearing had been denied because the date of the hearing fell on the trial date and did not qualify as a pretrial suppression motion. The CA Appeals Court found nothing wrong in scheduling the suppression hearing on the day of trial.

In *State of Iowa v. Johnson*, 2001.IA.0000701, the Supreme Court of Iowa stated the case suffered "from a terminal procedural illness." The defendant was untimely in filing for a suppression hearing in that he filed it in 80-days rather than within 40-day rule after his arraignment.

Should procedures and rules have such preemptive powers to extinguish constitutional rights?

It is clear from the sampling of cases above. There is confusion and nonconformity in the courts regarding the defendant's right to suppression hearings under the Fourth and Fourteenth Amendments. This is a recurring problem that needs to be addressed by this Court. Moreover, from a judicial economy point of view, fewer appeals would be filed if this issue is resolved once and for all.

II. The Fifth And Fourteenth Amendments Dictate That It Is A Violation of Due Process When Reasonable Defenses Claimed By Defendants Are Not Presented To the Jury.

The jurors who convicted petitioner were not advised despite petitioner's pleas of N.J.S. 2C:39-12 which provides immunity from prosecution if illegal assault weapons are surrendered to the authorities nor was the jury advised of the domestic violence statute N.J.S. 2C:25-21d(3) whereby property seized would be returned to the owner if the owner is not culpable. Petitioner was lured into self-incrimination by his

reliance on the immunity statute. The jury had no choice but to find petitioner guilty of illegal possession because there was undisputed testimony that he gave up the weapons and magazine but the jury was not charged as to the immunity statute.

The Fifth Amendment as applied to the states in the Fourteenth Amendment stands for the proposition that "no person...shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property without due process of law..."

In *United States v. Shotwell Manufacturing Co.*, 355 U.S. 233 (1957), Justice Black discussed the Court's position "that the Fifth Amendment bars the use against a defendant in a criminal prosecution of confessions or admissions secured from him by promises of immunity".

Under 2C:39-12, the State of New Jersey promises its citizens immunity if they voluntarily surrender illegal weapons and evidently, once the self-incrimination occurs it finds other reasons to prosecute arbitrarily and capriciously.

A jury cannot function properly as envisioned by our forefathers if it is deprived of a citizen's crucial defenses.

In *Segura v. United States*, 486 U.S. 796 (1984), Justice Stevens in the dissent, prophetically stated that if "we are to give more than lipservice to protection of core constitutional interests that were twice violated in this case, some effort must be made to isolate and then remove the advantages the Government derived from illegal conduct."

Thus, not only was petitioner deprived of his immunity and put through a prosecution but he was also deprived of his constitutional right to have the jury consider his defense of immunity under the weapon surrender statute. Petitioner who had a clean record is now a convicted felon. Moreover, his property was taken from him without due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A — Order Denying Discretionary Review By The New Jersey Supreme Court Dated March 25, 2002 And Filed March 26, 2002

SUPREME COURT OF NEW JERSEY
C-SOS September Term 2001
52,297

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENNIS BREEN,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4059-99 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 25th day of March, 2002.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

Appendix B — Opinion Of The New Jersey Appellate Division Filed October 5, 2001

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4059-99T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DENNIS BREEN,

Defendant-Appellant.

Argued: September 12, 2001 - Decided: October 5, 2001

Before Judges Conley, A. A. Rodriguez and Lisa.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, 99-03-00339-I.

Edward J. Zohn argued the cause for appellant.

Christine A. Hoffman, Deputy Attorney General, argued the cause for respondent; John J. Farmer, Jr., Attorney General of New Jersey, attorney).

Appendix B

PER CURIAM

Following a jury trial defendant, Dennis Breen, was convicted of two counts of third degree possession of an assault firearm, N.J.S.A. 2C:39-5f, and one count of unlawful possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3j. Judge Joyce Munkacsi imposed concurrent probationary terms of two years, with the following conditions: forfeiture of defendant's firearm purchasers identification card, no possession of firearms, payment of $1,000 fine, $150 VCCB penalty, $225 SNSF penalty, $30 LEOTEF penalty, and $25 monthly probation supervision fee. We affirm.

The facts, which are for the most part uncontested, can be summarized as follows. In the early morning hours of June 28, 1998, Officer Robert N. Weiler responded to a domestic violence call at the residence of defendant's brother, Duncan Breen. Officer Weiler arrested Duncan Breen for committing an act of domestic violence. Defendant was not present during this incident. At the scene, Weiler was advised by the domestic violence complainant and her son that there were weapons on the premises. Weiler seized a gun cabinet, a gun case, and two ammunition cases from a locked bedroom closet. Weiler asked for the keys to the cabinet and the cases. Duncan Breen told the officer that he did not have the keys, that only defendant had them. The cabinet and cases were brought to the South Brunswick Police Department.

At police headquarters, Weiler contacted a municipal court judge to obtain a restraining order and an authorization to open the cabinet and cases. Such order and authorization were granted by a municipal court judge. Weiler did not open or unlock the cabinet and cases, rather he kept them in a secure area.

Appendix B

Two days later, defendant's attorney sent a letter to the South Brunswick Chief of Police stating that "[o]n July 2, 1998, at 9:00 a.m., [defendant] intends to surrender firearms and devices defined by N.J.S.A 2C:39-lw and -ly." At the appointed time, defendant and his attorney appeared and met with Officer Scott Bevensee. Defendant provided the keys, to the seized cabinet and cases and surrendered a firearm (a Ruger mini—fourteen). Officer Bevensee inventoried the contents of the cabinet and cases in the presence of both defendant and his attorney. The gun cabinet contained several firearms, including a .22 long caliber Marlin semi-automatic rifle (Marlin) and a 7.62 x 39 mm caliber Norinco S.K.S. semi-automatic rifle (Norinco). It also contained nine large capacity magazines that could hold over fifteen bullets each. The South Brunswick Police retained possession of these items. Eventually the firearms were transferred to the Middlesex County Prosecutors s office.

Two months later, defendants counsel sent a letter to the Middlesex County Prosecutor requesting the return of defendant's property. There were several follow up telephone calls. The prosecutor's office responded in writing that it was undertaking an investigation to determine if defendant had violated any criminal code provisions. The weapons were transported to the State Police Firearms Unit for examination.

Defendant filed a Complaint for Replevin and Order to Show Cause. The replevin litigation culminated with Judge Figarotta, ordering the return of all of defendant's property, with the exception of the Norinco and the Marlin. Judge Figarotta determined, in a written opinion, that the Norinco and Marlin were assault weapons as defined by N.J.S.A. 2C:39-5f. Therefore, possession of these items was proscribed. The judge gave defendant six months to have the two weapons modified to

conform to the assault firearms statute. However, the judge stated, "[t]he weapons will not be returned to (defendant], even if modified to conform to statutory requirements, if the Prosecutor decides to prosecute plaintiff for possession of illegal weapons."

Shortly afterwards, defendant received a letter from the prosecutor's office indicating that all seized property "except the assault firearms" could be retrieved by him upon presentation of "appropriate documentation, i.e. purchase permit." The prosecutor sent another letter to defendant advising him that he was "a possible defendant" in a grand jury investigation of "unlawful possession of a weapon." Defendant was invited to testify before the Grand Jury and he was provided with a "waiver of immunity form." Defendant declined to testify before the Grand Jury.

Subsequently, a Grand Jury returned an indictment, charging defendant unlawful possession of two assault firearm (the Marlin and the Norinco), N.J.S.A. 2C:39-5f, and nine counts of fourth degree unlawful possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3j. Upon return of the indictment, the Criminal Division Manager, as Deputy Clerk of the Superior Court, issued a summons directing defendant to appear for an arraignment.

Subsequently, Judge Joyce Munkacsi denied defendant's motion to dismiss the indictment. On December 16, 1999, Judge Munkacsi denied defendant's request for a trial adjournment. Trial commenced five days later. At trial, Officers Weiler and Bevensee testified as fact witnesses. Detective Sergeant Randolph Toth of the New Jersey State Police Ballistics Unit was qualified as an expert in firearms. He testified that, after test-firing the Marlin and the Norinco, he concluded that both firearms were operable, and that both weapons qualified as assault rifles.

Appendix B

Toth demonstrated how many bullets could be loaded into one of the seized large ammunition magazines. Over defendant's objection, the judge allowed Toth to show that the magazine seized held at least twenty-one rounds of ammunition. A "high-capacity ammunition magazine" is defined by statute as "a box, drum, tube or other container which is capable of holding more than 15 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm." N.J.S.A. 20:39-ly. After the capacity of the magazine was demonstrated, the State rested. Thereafter, the judge dismissed the charges on the remaining eight magazines, but not for the magazine that was demonstrated in the courtroom.

Deborah Blaney testified as a character witness for the defense. Duncan Brien testified that defendant was the only person who had keys to the cabinet and cases seized. Defendant did not testify.

On appeal defendant contends that the judge erred by denying his request for an adjournment of the trial to secure a witness. The contention is based on the following. In the discovery provided by the State, there were two reports regarding the classification of the Norinco, Marlin, and Ruger. One report, by Middlesex County Prosecutors Investigator Ciro F. Sinagra, concluded that the Ruger and the Norinco are assault firearms. The other report by State Police Detective Robert Toth, concluded that the Norinco and the Marlin are assault firearms but that the Ruger was not an assault firearm. Defendant sought to call Sinagra as a defense witness to contradict the opinion of the States expert, Sergeant Toth. Sinagra was subpoenaed by defense counsel. However, Sinagra was unavailable during the time of trial because of active military duty. Defense sought an adjournment which was denied.

Appendix B

We reject the contention that it was harmful error to deny the adjournment request. As the state argues, Sinagra was not an essential witness to the defense. First, defendant has made no showing that Sinagra was qualified as an expert in firearms or that he had even examined the Marlin. Second, N.J.S.A. 2C:39-5f has been construed as proscribing knowing possession, as distinguished from knowledge that the rifle was in the prohibited class of assault firearms. See State v. Pelleteri, 294 N.J. Super. 330, 334 (App. Div. 1996), certif. denied, 148 N.J. 461 (1997). Therefore, even if defendant did not know that the rifles that he owned qualified as assault firearms, such lack of knowledge is not a defense.

Moreover, the granting of an adjournment to obtain a witness is at the discretion of the trial court. State v. Matarama, 306 N.J. Super. 6, 14 (App. Div. 1997), certif. denied, 153 N.J. 56 (1998). We will reverse the denial of a trial adjournment only where the factual record demonstrates that the trial court abused its discretion. Id. at 14. We perceive no abuse of discretion here.

Defendant also contends that the judge should not have allowed State's witness Toth to have conducted a demonstration in the courtroom without prior notice to the defense. We disagree. A trial court has considerable latitude in determining whether to admit evidence, and that determination will be reversed only if the trial court clearly abused its discretion. State v. McDougald, 120 N.J. 523, 577-78 (1990). Here, the demonstration was not only within the scope of the evidence, but was also required to prove an element of the crime. As noted earlier, the jury was fully apprised of the limitations of the demonstration. The judge did not abuse her discretion in allowing the demonstration.

Defendant also contends that the judge should have ruled that the immunity provided by N.J.S.A. 39-12 applied to his case

as a matter of law. In the alternative, defendant contends that the judge erred by not charging the jury on the elements of this immunity. We find no error in the judges ruling that the immunity did not apply or the decision to deny the request for an immunity charge.

N.J.S.A. 2C:39-12 provides, in relevant part:

> Voluntary Surrender. No person shall be convicted of an offense under this chapter for possessing any firearms, weapons, destructive devices, silencers or explosives, if after giving written notice of. his intention to do so, including the proposed date and time of surrender, he voluntarily surrendered the weapon, device, instrument or substance in question to the superintendent or to the chief of police in the municipality in which he resides, provided that the required notice is received by the superintendent or chief of police before any charges have been made or complaints filed against such person for the unlawful possession of the weapon, device, instrument or substance in question and before any investigation has been commenced by any law enforcement agency concerning the unlawful possession. (emphasis added)

Here, the immunity does not apply. First, although defendant retained ownership of the firearms, he no longer had possession after their seizure. Once the gun cabinet and cases were seized, defendant no longer exerted control over them. Thus, he did not possess them. As a result, he had nothing to surrender. See, e.g., State v. McCoy, 116 N.J. 293, 299 (1989) (possession is "the ability to affect physically and care for the item during a

span of time"); State v. Brown, 80 N.J. 587, 597-98 (1979) (possession is the ability to control the thing possessed). His surrender of the keys to the cabinet and cases did not transfer possession of them or their contents to the police. That transfer of possession was accomplished upon the seizure from Duncan Breen's home.

Second, once the police seized the cabinet and cases, an investigation had commenced. The statute provides that immunity will be granted "provided that the required notice [of voluntary surrender] is received . . . before any investigation has been commenced by any law enforcement agency concerning the unlawful possession." (emphasis added) N.J.S.A. 2C:39-12. The police investigation began upon the seizure. A person cannot lawfully possess a firearm, unless certain requirements are met, such as, obtaining a purchaser permit, permit to carry, or license. Therefore, once a police officer comes into possession of a firearm, an investigation is required before the firearm can be returned to a person claiming ownership. Here, the police had furthered its investigation by seeking authorization to open the cabinet and cases, before defendant sought to "surrender" the firearm.

Defendant also argues that the judge should have instructed the jury on N.J.S.A. 2C:25-21d, which provides that "[w]eapons seized in accordance with the above shall be returned to the owner except upon order of the Superior Court." Defendant contends that once it was determined that he was the true owner of the firearms and that the firearms did not belong to the domestic violence defendant, the property should have been returned. Specifically, defendant argues that the comment to this section states that this statute "regulates the confiscation and forfeiture of weapons possessed by a person charged with domestic violence." Cannel, Criminal Code Annotated, N.J.S.A. 2C:25-21, comment

2 (2001). Defendant argues that because he was not charged with domestic violence, the weapons should have been returned immediately. Defendant's argument is unpersuasive. It is also irrelevant to a criminal charge of possession of assault firearms. Obviously, N.J.S.A. 20:25-21a has to be read subject to the proscriptions found in the Criminal Code regarding unlawful possession of firearms.

Defendant also contends that his conviction was against the weight of the evidence. This issue is procedurally barred because, as he concedes, no motion for a new trial was made. The issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. R. 2:10-1. Defendant seeks to overcome this bar by arguing that: (1) he moved for acquittal on all charges at the close of State's case, pursuant to R. 3:18-1; and (2) an appellate court may choose to review the weight of the evidence issue 'in the interest of justice." State v. Smith, 262 N.J. Super. 487, 511-12 (App. Div. 1993). However, from our review of the record we conclude that defendant has failed to show that "it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1.

The remaining contentions are:

> THE TRIAL COURT ERRED IN THAT IT DID NOT HAVE JURISDICTION OVER THE DEFENDANT SINCE A CRIMINAL COMPLAINT WAS NEVER ISSUED.
>
> THE MOTION TO DISMISS INDICTMENT SHOULD HAVE BEEN GRANTED BY THE TRIAL COURT. THE TRIAL COURT ERRED IN

THAT IT ALLOWED THE STATE TO PRESENT DEMONSTRATIVE EVIDENCE IN THE COURTROOM WITHOUT NOTICE TO THE DEFENDANT'S ATTORNEY, SUCH PRESENTATION WHICH WAS UNCONTROLLED AND HIGHLY PREJUDICIAL.

THE TRIAL COURT ERRED IN THAT IT DID NOT ALLOW EVIDENCE TO BE PRESENTED REGARDING THE EXISTENCE OF THE CIVIL CASE, THAT THE CIVIL ORDER WOULD HAVE NULLIFIED ANY ALLEGED ILLEGALITY AND THAT THE PROSECUTOR PREVENTED THIS ORDER FROM BEING FOLLOWED.

THE JURY CHARGE WAS DEFECTIVE, AND HENCE THE TRIAL COURT ERRED, BECAUSE LAW REGARDING DEFENSES WAS NOT PRESENTED TO THE JURY.

We have carefully considered these contentions against the record and conclude that these arguments are without merit and do not warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

Appendix C -Decision In The Civil Action for Replevin Dated And Filed February 19, 1999

February 19, 1999

Robert H. Corbin, Assistant Prosecutor
County of Middlesex Prosecutor's Office
P0 Box 71
New Brunswick, NJ 08903-0071

Edward I. Zohn, Esquire
Attorney at Law
11 East Cliff Street
Somerville, NJ 08876

RE: Dennis Breen v. County of Middlesex. Et Als.
L-274-99

Dear Counsel:

I. INTRODUCTION

The plaintiff, Dennis Breen, ("plaintiff") filed an Order to Show Cause and Replevin against Middlesex County Prosecutor, ("defendant"), seeking to have defendant immediately return all of plaintiff's firearms, magazines, ammunition and accessories to plaintiff. The Order to Show Cause was originally returnable on February 5, 1999 before the Honorable Steven L. Lefelt but was adjourned to February 8, 1999 before the Honorable Robert P. Figarotta. The matter was heard at oral argument with the plaintiff represented by Edward J. Zohn, Esquire and defendant by Robert H. Corbin, Assistant Prosecutor.

Appendix C

II. BACKGROUND

On or about June 28, 1998, the police were called to the residence of Duncan Breen ("Duncan") in response to an alleged domestic violence incident involving Duncan. Plaintiff is Duncan's brother and has never lived with him nor was plaintiff at Duncan's residence at the time of the alleged incident. That day, a gun security cabinet, a black gun case, a green ammunition can and a wooden case were seized from the residence of Duncan by the South Brunswick Police Department. The items seized belong to plaintiff Plaintiff was not there at that time and has not been accused of any acts of domestic violence or crimes. On July 1, 1998, plaintiff sent a letter to South Brunswick Chief of Police letting him know that on July 2, 1998, plaintiff intended to surrender firearms and devices defined by N.J.S. 2C:39-1w and 1y. This surrender did occur on July 2, 1998. The items surrendered by plaintiff on July 2, 1998 were:

a) one Ruger mini-14 rifle, serial number 188-06645, caliber .223

b) one Norinco SKS rifle, serial number 9019209, caliber 7.62 x 39

c) nine detachable magazines with capacities greater than 15 rounds

d) the key to the gun cabinet seized on or about June 28, 1998.

South Brunswick Police Department retained possession and completed a detailed property report of the above rifles and magazines as well as other firearms, magazines, ammunition and

accessories belonging to plaintiff After that date, the firearms, magazines, ammunition and accessories were transported to the Middlesex County Prosecutor who has not petitioned that he intends to obtain title to the firearms; magazines, etc. Plaintiff asserts that all of firearms, magazines, etc. conform to statutory requirements except for the ones which can be modified to conform. Plaintiff has tried to get his firearms, magazines, etc. back but the Prosecutor has retained all of them. The weapons were inspected by Investigator Ciro F. Sinagra who reported that 2 of the firearms seized are in fact assault weapons as per N.J.S. 2C:39-1w(1). One other was determined to be an assault weapon upon first inspection by the South Brunswick Police Department. All three weapons were then transported to the State Police Firearms Unit for examination. The State Police Firearms Unit has submitted a report indicating that two of the three weapons are in fact assault weapons. The two assault weapons are the 7.62 X 39MM caliber NORINCO semiautomatic title, serial number 9019209 and the .22 Long Rifle caliber Marlin semiautomatic rifle, serial number 20379083. The .223 Rem. caliber Ruger semiautomatic rifle, serial number 188-06646 was not determined to be an assault weapon by the State Police although it was before determined to be an assault weapon by Investigator Sinagra. The Middlesex County Prosecutor still retains possession of ***all*** of plaintiff's firearms, magazines, etc.

III. FINDINGS AND CONCLUSIONS

Over six months has passed since plaintiffs firearms, magazines, etc. have been seized and/or surrendered to defendant. At this time, plaintiff has not been charged with any offense for possessing assault weapons in violation of N.J.S. 2C:39-1. Moreover, plaintiff has no involvement in the domestic violence incident which triggered the seizure and/or surrender and then this

instant action.

The Court finds that plaintiff is entitled to have his firearms, magazines, etc. returned to him **except** for the 7.62 X 39MM caliber NORINCO semiautomatic rifle, serial number 9019209 and the .22 Long Rifle caliber Marlin semiautomatic rifle, serial number 20379083 which were determined to be assault weapons as per N.J.S. 2C:39-1. The Court finds no substantial reason to have defendant retain possession of plaintiffs non-assault weapons. Plaintiff is not in any way involved with the domestic violence complaint and therefore the return of weapons procedure under N.J.S. 2C:25-21 is not triggered. Even if N.J.S. 2C:25-21 was triggered, that is if plaintiff was the defendant in a domestic violence complaint, the weapons would still have to (be) returned if certain circumstances existed.[1] No substantial reason has been offered by defendant as to why the other firearms, magazines, etc., have been retained for this lengthy period of time.[2] Consequently, plaintiff is entitled to the return of all firearms, magazines, etc. except for the two classified as assault weapons.

The Court finds that the defendant is to retain possession of the two aforementioned assault weapons since they violate the statute. While plaintiff is requesting the return of all his firearms, magazines, etc., that cannot be granted since two of the firearms have been determined by the State Police to be assault weapons and therefore illegal. However, Plaintiff will be allowed six months from the date of this order to have the assault weapons modified to conform to the statute. If this is done and the weapons, in their modified state, conform to the statutory requirements then plaintiff will be entitled to the return of those weapons.[3] If, at the expiration of the six month period, plaintiff has not been able to have the weapons sufficiently modified to conform with the statute then they will be forfeited. Upon

presentation of required documentation to defendant, all other, non-assault, firearms, magazines, etc. shall be returned to plaintiff.

s/ Robert P. Figarotta
HON. ROBERT P. FIGAROTTA

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[1]Under N.J.S. 2C:25-21(d)(3), weapons seized during a domestic violence incident are to be returned to the owner "...if the complaint has been dismissed at the request of the complainant and the prosecutor determines there is insufficient probable cause to indict; or if the defendant is found not guilty of the charges; or if the court determines that the domestic violence situation no longer exists." Therefore, even if plaintiff were involved in the domestic violence incident and one of the above circumstances existed, he would entitled to the return of his weapons.

[2] Defendant asserts that all of the weapons were being held until a determination was made about the ones they thought were assault weapons. At this time, we have that determination which directs that only two weapons are classified as assault weapons. All other firearms, magazines, etc., should be returned to plaintiff.

[3]The weapons will not be returned to plaintiff even if modified to conform to statutory requirements, if the Prosecutor decides to prosecute plaintiff for possession of illegal weapons.

Appendix D — Decision In The Civil Action for Replevin Dated And Filed February 19, 1999

EDWARD J. ZOHN
ATTORNEY AT LAW
11 East Cliff Street
Somerville, New Jersey 08876
Telephone (908) 526-8220
Facsimile (908) 526-8664

Attorney for Property Owner

DENNIS BREEN, PLAINTIFF,	
v.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART
COUNTY OF MIDDLESEX; TOWNSHIP OF SOUTH BRUNSWICK, TOWNSHIP OF SOUTH BRUNSWICK POLICE DEPARTMENT, and **GLENN BERMAN, PROSECUTOR OF MIDDLESEX COUNTY**	MIDDLESEX COUNTY DOCKET no.: L-274-99 CIVIL ACTION **ORDER FOR REPLEVIN**
DEFENDANTS.	

THIS MATTER having been opened to the Court upon Complaint and Order to Show Cause by Edward J. Zohn, Esq. attorney for the plaintiff Dennis Breen, and Assistant Prosecutor Robert H. Corbin, of the Office of the Middlesex County Prosecutor, having appeared on behalf of the defendant Middlesex County Prosecutor, and Donald J. Sears, Esq., of Busch & Busch,

Appendix D

Attorneys, having appeared on behalf of the Township of South Brunswick and the Township of South Brunswick Police Department, and the Court having heard oral argument on February 8, 1999, having considered the papers submitted and having issued a written Opinion on February 19, 1999, and good cause having been found;

IT IS on this 15 day of March, 1999
ORDERED as follows:

1. All firearms, magazines, ammunition and accessories seized and held by the Middlesex County Prosecutor or by South Brunswick Police Department, such property which belongs to the plaintiff Dennis Breen, shall be immediately returned to the plaintiff upon presentation of required documentation except for the Norinco rifle, caliber 7.62x39mm, serial number 9019209, and the Marlin Model 60 rifle, caliber 22LR, serial number 20379083.

2. The plaintiff shall be entitled to the return of the Norinco SKS rifle, caliber 7.62x39mm, serial number 9019209, and the Marlin Model 60 rifle, caliber 22LR, serial number 20379083, if they are modified to conform to the New Jersey "assault firearm" statute, and plaintiff is granted six months from February 19, 1999 to have this accomplished. If at the expiration of the six-month period, the rifles have not been so modified, they shall be forfeited.

3. A copy of this order shall be served upon all parties or attorneys of record within 7 days..

s/ Robert P. Figarotta
ROBERT P. FIGAROTTA
JUDGE

Appendix E - Order Denying Suppression Of Evidence By The Trial Judge Dated December 21, 2002

EDWARD J. ZOHN
Attorney at Law
11 East Cliff Street
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Facsimile (908) 526-8664

Attorney for Defendant

STATE OF NEW JERSEY,
Plaintiff,

v.

DENNIS BREEN,
Defendant.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION,
CRIMINAL PART
MIDDLESEX COUNTY

INDICTMENT no. 99-03-0339

CRIMINAL ACTION

ORDER FOR SUPPRESSION OF EVIDENCE

THIS MATTER having been opened to the Court by Edward J. Zohn, Esq., attorney for the defendant, for an Order suppressing all evidence taken from the home of Duncan Breen, at 200 Beckman Road in Monmouth Junction in the Township of South Brunswick on June 28, 1998, upon the grounds identified in the Letter Brief which is submitted in conjunction with the Notice of Motion, and Assistant Prosecutor Robert H. Corbin of the Office of the Middlesex County Prosecutor having appeared for the State of New Jersey, and the Court having considered the

Appendix E

papers submitted, and good cause appearing, it is on this 21st day of December, 1999

ORDERED that:

I. Defendant's request to have all evidence taken from the home of Duncan Breen, at 200 Beekman Road in Monmouth Junction in the Township of South Brunswick on June 28, 1998, suppressed is HEREBY DENIED, (the following was handwritten) both for the reason that it was grossly out of time and also, if heard, because of the lack of merit.

/s Joyce S. E. Munkacsi
J.S.C.

This Motion was
(x) opposed
( ) unopposed

Appendix F — Order Of The New Jersey Supreme Court On the Motion for Reconsideration Dated May 9, 2002 And Filed May 13, 2002

SUPREME COURT OF NEW JERSEY
M-1169 September Term 2001
52,297

STATE OF NEW JERSEY,

Plaintiff,

v. ORDER

DENNIS BREEN,

Defendant -Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 9th day of May, 2002.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

Appendix G - Memorandum In Support of Motion In Limine To Suppress Evidence Dated December 20, 1999

EDWARD J. ZOHN
ATTORNEY AT LAW

11 East Cliff Street
Somerville, New Jersey 08876

Member
NJ., N.Y. and Conn. Bars

Telephone (908) 526-8220
Facsimile (908) 526-8664

December 20, 1999

Honorable Joyce E. Munkacsi, J.S.C.
Superior Court of New Jersey
Administration Building, Chambers 509
1 J.F.K. Square, P.O. Box 964
New Brunswick, N.J. 08903-0964

Re: State v. Breen
Indictment no. 99-03-0339

Sent by facsimile only to 732/981-3275

Dear Judge Munkacsi:

Please accept this letter memorandum as a supplement to my Notice of Motion In Limine to Suppress Evidence.

Argument

Though *R.* 3:5-7 normally provides that all suppression motions should be made prior to trial, the evidence supporting my application did not become evident until this past weekend. If new evidence comes to light which has been previously unavailable, it is respectfully submitted that this evidence should be considered

by the court. *See, e.g., State v. Roccasecca,* 130 *N.J. Super.* 585, 591 (Law. Div. 1994). The proper procedure is to move for a continuance pending disposition of the suppression motion. *See State v. Perry,* 59 *N.J.* 383, 386 (1971). While the defendant has the burden of showing good cause for an untimely application, *see State v. Redmond,* 95 *N.J. Super.* 175, 179 (App. Div. 1967), a legitimate state interest must be served for the timeliness requirement to be followed strictly. *See id.* at 180 (citing *Henry v. State of Mississippi,* 379 U.S. 443, 447-48, 85 *S.Ct.* 564, 567, 13 *L.Ed.*2d 408, 413). Furthermore, Your Honor has previously signaled that "in limine" motions would be heard after the jury was impaneled.

One of the documents included by the State in its initial discovery package (a police report completed by Officer Robert Weiler of the South Brunswick Police officer whom the State has indicated will be called as a witness in the trial) seems to imply that the search of the closet in the room occupied by Dennis Breen's brother was without the benefit of a warrant. I only found out this past weekend, from Dennis Breen's brother Duncan Breen, the domestic violence defendant, that the aforementioned implication is absolutely true, i.e. it was not possible for the search of the closet to have been with a warrant.

The search, therefore, would have to be justified as a warrantless search. I also just found out, additionally, that officers of the South Brunswick Police Department knew at the time of the search that the contents of the closet at 200 Beckman Road did ***not*** belong to Duncan Breen. Moreover, I now know that it was impossible for the police to have taken the safe and three cases without breaking the door or the lock. This too was unclear in Officer Weiler's report.

Appendics G

What we have is a search that must be justified as a warrantless search. I respectfully submit that the Prevention of Domestic Violence Act; specifically *N.J.S.* 2C:25-21, would not have allowed police officers to search the closet in this case, when the domestic violence defendant was removed from the scene of the alleged domestic violence incident, the door to the closet was locked, and the police knew that the contents of the closet did not belong to the domestic violence defendant.

I therefore request a continuance so that both I and the state can fully brief and argue this motion.

Thank you very much for your courtesy and consideration.

Respectfully,

s/ Edward J. Zohn
Edward J. Zohn

cc: Assistant Prosecutor Robert H. Corbin, by facsimile only to 732/745-2089

Mr. Dennis Breen